Supreme Court, U.S.
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NO. 89-555

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IN THE
SUPREME COURT OF
THE UNITED STATES
October Term, 1989

*

BENTON MUSSLEWHITE,
Petitioner

VS.

THE STATE BAR OF TEXAS,
Respondent

*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

*

PETITIONER'S REPLY TO BRIEF OF RESPONDENT AND SUPPLEMENTAL APPENDICES

* * *

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I.

Respondent in effect admits it has not carried its burden to show a valid state ground for blanket ban on supersedeas.

It is crucial to note that the Respondent, in its Brief filed in this Court, has not in any way contradicted Petitioner's assertions that he has never been charged with any crime or act involving moral turpitude; that he has never posed a threat of harm to his clients or the public; that Respondent offered absolutely no evidence in the state courts which would establish any valid state ground for denying Petitioner supersedeas pending his appeal on the merits; and that the state appellate courts are stringing out his appeal so that his three year suspension will virtually be over by the time he wins his appeal.

Based on Respondent's Brief, both

Petitioner and Respondent[1] agree that Sec. 24, Art. 10 of Texas State Bar Rules, as written, prohibits supersedeas for every Texas lawyer suspended by a trial court, regardless of the "circumstances." Sec. 24 "takes no prisoners". Since it does not contain any provisions mandating that the appeal be expedited, it totally nullifies the great majority of appeals by lawyers suspended by the trial court because the period of suspension in most of those appeals will be less than the time it takes to complete the appellate process in the state courts (2 to 2 1/2 years).

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[1] The Respondent states that "Sec. 24 not only covers the above-mentioned situations (harm to clients or convicted felon), but also all other situations in which lawyers have been suspended or disbarred" (p. 12 and 13, Resp.'s Bf.; emph. ours). Respondent further states that "(n)o discretion to override this statute (Sec. 24) is granted to any court . . . Judge Casseb (the trial judge) did not even have any discretion to abuse" (p. 10, 11; emph. ours).

Petitioner's case is a classic example of just how devastating Sec. 24 can be. Petitioner was suspended January 31, 1989 and supersedeas was denied. The Texas intermediary appellate court, because it had the discretion to do so, denied Petitioner's motions to accelerate and expedite his appeal on the merits. It now appears that the intermediate appellate court will not set Petitioner's case for oral argument until May, 1990 (see affidavit of Ms. Kathryn Diaz, attached as App. FF, Supp. App.). Thus, it now seems probable that more than 2 1/2 years of total suspension time will go by before the appellate process can be completed in the state court system.

By virtue of this vicious vise - the combination of the enforcement of an unconstitutional blanket ban on supersedeas and the unconstitutional stringing out of Petitioner's appeal-

Petitioner's right to appeal from the unjust three year suspension has been effectively nullified. But, the Respondent says that all this is permitted under the Constitution because "lack of public confidence in the integrity of the bar overrides any policy that would permit an attorney who has been duly found by a trial court to have committed professional misconduct (no matter how constitutionally flawed that trial is) to continue to practice law pending appeal of their suspension . ." (p. 15, Resp.'s Bf.; emph. ours). In other words, according to the State Bar of Texas, destroying the law practice, professional standing and family life of every lawyer suspended by a trial court is more important than trying to construct a reasonable supersedeas statute (which most assuredly can be done) that would protect both the rights of the public and the suspended lawyer pending an

appeal that he or she will probably win.

The substance of Respondent's argument is that because the suspended attorney might just possibly do something wrong pending appeal[2], such attorney should not be allowed supersedeas under any circumstances. We hasten to point out that the Respondent did not offer one iota of evidence in the state courts which would even tend to show that there is an inherent probability that lawyers suspended by a trial court will do any of the things it only speculates about in its "unsupported assertions" before this Court.

This kind of response to the critical issue of the constitutionality of Sec. 24

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[2] The Respondent states that clients unaware of the suspension 'may' compromise their rights; adversary counsel 'may' be reluctant to negotiate with the suspended attorney; or that the suspended lawyer 'may' predict defeat and thereby engage in additional serious misconduct (pp. 15 and 16, Resp.'s Bf.; emph. ours).

is fatal to Respondent's position. In an analogous situation, this Court, in holding that a blanket ban on the use of illustrations in attorneys' advertising was unconstitutional, stated that:

> "The State's arguments amount to little more than unsupported assertions: nowhere does the State cite any evidence or authority of any kind for its contention that the potential abuses associated with the use of illustrations in attorneys' advertising cannot be combated by any means short of a blanket ban . . . . Thus, acceptance of the State's argument would be tantamount to adoption of the principle that a State may prohibit the use of pictures or illustrations . . simply on the strength of the general argument that the visual content of advertisements may, under some circumstances, be deceptive or manipulative. But as we stated above, broad prophylactic rules may not be so lightly justified . . . ."

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648, 649, 85 L Ed 2d 652, 671 (1985); emph. ours.

Respondent, by its own Brief, has

conclusively demonstrated that it did not, has not, will not and can not meet its burden to offer more than "unsupported assertions" about how the Respondent has a valid state ground for imposing a blanket ban upon all supersedeas' for suspended Texas lawyers.

II.

The Respondent erroneously minimizes the value of the right to practice law and seeks to uphold an invalid "classification," in violation of the Equal Protection Clause.

It is hard to believe that any bar association would manifest the calloused and materialistic attitude toward its members as that expressed in the last statement in the Brief of Respondent that the "sole harm" to Musslewhite (by enforcement of Sec. 24) "is nothing more than that of loss of economic earning power." (p. 19, Resp.'s Bf.; emph. ours.)

The Respondent further asserts, that the Texas courts take the view that the

"practice of law is a license, not a right" (p. 14, 17 and 18, Resp.'s Bf.).[3] But this is flatly contrary to the law expressed by this Court. After stating that lawyers "cannot be prevented from practicing (law) except for valid (state) reasons" the Court ruled that "the practice of law is not a matter of the State's grace." Schware v. Board of Bar Examiners, 53 U.S. 232, 238, 1 L Ed 2d 796, 801 (1957); emphasis ours. See also Willner v. Committee on Character and Fitness, 373 U.S. 96, 10 L Ed. 224 (1963); Board of Regents v. Roth, 408 U.S. 564, 33

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[3] The Texas state courts' cavalier attitude toward professional people was further manifested in Sizemore v. State Board of Dental Examiners, 759 S.W.2d 114 (Tex. Sup. 1988). The lower court had correctly observed: ". . . the right to practice a profession has been called a property right, but it is more . . . it takes from him his professional standing and, in a manner, whatever good name he has, which leaves him poor indeed . . . ." 747 S.W.2d at 389. Sadly, the Texas Supreme Court rejected such rationale.

L Ed 2d 5488 (1972); In the Matter of John Ruffalo, Jr., 390 U.S. 544, 20 L Ed 2d 874 (1968); and Zauderer 85 L Ed 2d at 684 (Brennan, J. stated, that lawyers' rights also involve "a person's good name, reputation, honor, and integrity"; 85 L Ed 2d at 684).

The contrary philosophy of the Texas State Bar and Texas Supreme Court explains how they could so blithely adopt a state bar rule (Sec. 24) which possesses such destructive force.[4] Since it views

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[4] As we have explained to some extent in the Petition, pp. 5-8, 16, 32-34, and see App. R, the consequences of Petitioner's suspension pending appeal have been brutal and catastrophic. They have had, and continues to have, devastating impact upon the Petitioner's financial well-being, professional standing, reputation, honor, associations in the community and, most important, upon his clients and family. This irreparable harm is cumulative on a geometrically progressive basis. For example, the longer the suspension, the harder it is to start-up the Petitioner's law practice again; the more the stigma accumulates; and the greater the reluctance of old clients, unions and referring attorneys to

lawyers' rights as being confined to "economic earning power" and ignores those humanitarian concepts of reputation, honor, integrity and similar intangible considerations, such philosophy breeds unconstitutional values, rules and actions. The sad truth is that the persecution of Petitioner is but a symptom of a deeper illness in the State Bar of Texas - a cancer of materialism and greed that has metastasized in its very soul.

The question arises as to whether a state, if it permits supersedeas to its citizens generally, can constitutionally deny supersedeas to a subsidiary group of its citizens without having valid state reasons for doing so. This Court answered this question in Lindsey v. Normet, 405 U.S. 56, 31 L Ed 2d 36 (1971). There, the Court struck down, as a violation of the

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do business with Petitioner when he does finally vindicate himself.

Equal Protection Clause, an Oregon provision that required a losing tenant in a landlord-tenant case to post a supersedeas bond of twice the amount of the rent expected to accrue pending an appellate decision and to forfeit such amount to the landlord if the trial court decision in the landlord's favor was affirmed. This Court observed that, once a state provides appellate review to its citizens generally, "it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause" and that a statute which "heavily burdens" appeals of a certain group by making supersedeas difficult or impossible, violates the Equal Protection rights of such group. 31 L Ed 2d at pp. 52 and 53.

And this is what Sec. 24 does, but with substantially greater burden on the burdened group. Rule 47 of the Tex.

Rules of App. Proc. grants the right of supersedeas generally to all civil litigants and defines the procedure for obtaining a supersedeas bond in all types of cases. Such statutory supersedeas scheme thus, as stated in Lindsey, invokes the Due Process and Equal Protection Clause of the U.S. Constitution and precludes the state from arbitrarily or capriciously denying such supersedeas to any group of its citizens. But Sec. 24 carves out a class (lawyers suspended by a trial court) and not only imposes upon it a substantially greater burden than was imposed in Lindsey, but abolishes its right to supersedeas altogether. There is no doubt that, under Lindsey, Sec. 24 violates the Equal Protection Clause.

And in Bankers Life and Casualty Co. v. Crenshaw, 100 L Ed 2d 62 (1988), this Court upheld a Mississippi penalty statute but, in doing so, distinguished

Lindsey, stating that the bonding requirement in Lindsey was "unrelated" to the thing (accrual of rent) being protected; that it "burdened only tenants" and thus erected "a substantial barrier to appeal faced by no other civil litigant in Oregon"; and "bore no reasonable relationship to any valid state objective." 100 L Ed 2d at 75; emph. ours.

The blanket ban on supersedeas effectuated by Sec. 24 bears no relationship to anything - certainly not to any "valid state objective". Sec. 22 of Art. 10 of the Texas State Bar Rules does bear a reasonable relationship to valid state objectives because it provides a mechanism for protecting, on an interim basis, the public just from those lawyers who threaten harm to it, without wreaking havoc upon every lawyer who is the subject of a disciplinary proceeding. But,

unfortunately, as the Respondent proudly points out in its Brief, Sec. 24 does not limit its scope to those who might come within the provisions of Sec. 22 or Sec. 26 (providing for interim suspension when a lawyer has been convicted of a crime of moral turpitude).

Instead, Sec. 24 is the epitome of overbreadth. As the Respondent brags, without a sign of remorse, Sec. 24 applies not only to lawyers who might be subject to valid state grounds for interim suspension, such as those articulated in Secs. 22 and 26, but "also all other situations in which lawyers have been suspended" (p. 13). These would include those to whom the no-supersedeas rule, combined with the length of time for appeal, poses not only a "substantial barrier" to their appeal, but renders their appeal utterly meaningless and hopeless. Thus, under this Court's

explanation of Lindsey in the recent case of Bankers Life v. Crenshaw, there simply is no possible way the blanket ban in Sec. 24 can pass constitutional muster. See also Williams v. City of Oklahoma, 395 U.S. 458, 23 L Ed 2d 440 (1969); Logan v. Zimmerman Brush Co., 455 U.S. 422, 71 L Ed 2d 265 (1982); Griffin v. Illinois, 351 U.S. 12, 100 L Ed 891 (1955) and Evitts v. Lucey, 469 US 387, 83 L Ed 2d 821 (1985).

Also important to the questions presented in this Petition is Freedman v. Maryland, 380 US 51, 13 L Ed 2d 649 (1965). There, this Court struck down a motion-picture censorship statute because, once it was invoked, the censored party could not show the film pending judicial review no matter, no matter how "protracted" that judicial review might

be.[5]

In this case, a fatal flaw in Sec. 24 is that it does nothing to protect the lawyer who eventually wins his appeal on the merits. It does not contain a "specified brief period" for resolving the appeal or a mandate that the appeal must be accelerated and determined within the "shortest fixed period compatible with sound judicial resolution." Indeed, what is happening to Petitioner exemplifies

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[5] This Court stated: "To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution . . . . Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license. Without these safeguards, it may prove too burdensome to seek review of the censor's determination." 13 L Ed 2d at pp. 654, 655 (emph. ours).

precisely why a statute such as Sec. 24 must be struck down. See also Chicago Teachers Union v. Hudson, 475 U.S. 292, 89 L Ed 2d 232 (1986); F.E.C. v. Mass Citizens for Life, 479 US 238, 93 L Ed 2d 539 (1986) and National Socialist Party v. Village of Skokie, 42 US 43, 53 L Ed 2d 96 (1977). In Skokie, as in this case, the state courts had both denied a stay of enforcement (same as denial of supersedeas) and an expedited appeal and the Court held that the denial of both violalted the constitutional rights of the appellant.[6] Thus, Skokie makes it clear

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[6] In Skokie, this Court stated pertinently: "It finally determined the merits of petitioners' claim that the outstanding injunction will deprive them of rights protected by the First Amendment during the period of appellate review which, in the normal course, may take a year or more to complete. If a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, Freedman v. Maryland, 80 U.S. 51 (1965), 13 L Ed 2d 649, 85 S Ct 734, including immediate appellate review, see Nebraska Press Assn. v. Stuart, 423 U.S.

that the procedural safeguards mandated in Freedman include the right of "immediate appellate review" and makes it clear that the double whammy inflicted upon Petitioner in this case - no supersedeas and no acceleration of appeal - violates Petitioner's constitutional rights.

III.

This Petition Presents Important Questions For Review Which Deserve Resolution by This Court.

There is no doubt that Sec. 24 is unconstitutional as written and that the enforcement of that statute, combined with the denial of an accelerated appeal (see App. B, W, F and X), makes it unconstitutional as applied in this case. Petitioner hopes that this Court will, as in Skokie, dispose of this matter in per

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119, 1327 (1975) (Blackmun, Jr., in chambers). Absent such review, the State must instead allow a stay. The order of the Illinois Supreme Court constituted a denial of that right."

curiam fashion and grant the supersedeas and/or order the state courts to grant supersedeas. However, the issues presented in this case are substantial in breadth and depth and deserve resolution by this Court. They affect all professional persons and all state agencies who purport to regulate professional persons and, indeed, the scope and importance of the constitutional issues here involved obviously extend far beyond the rights of such persons and entities and has some impact upon all citizens.[7]

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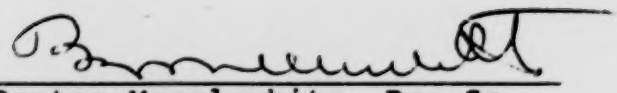
[7] The Respondent's Brief contains a number of disingenuous statements, not the least of which is its characterization of the underlying disciplinary proceedings in a manner inconsistent with what subsequent discovery and events have made clear is the truth. While the viability of those allegations is not directly relevant to the issues here, Petitioner would like to mention, having had the honor of appearing before this Court (Chick Kam Choo v. Exxon, 108 S. Ct. 1684 (1988), that it is all the more embarrassing and frustrating to suffer through Respondent's repetition

of these comments. Suffice to say that the deposition excerpts of Ms. Barham and Ms. Merritt, the two lead so-called "serious neglect" cases, attached as App. GG in the Supp. App., demonstrate that their complaints boiled down to nothing more than alleged unanswered telephone calls. Respondent does not even accept such complaints for filing with regard to other lawyers (App. L). As to the "solicitation" allegations, Petitioner eagerly agreed to allow the Custodian to examine every one of his files to determine if any had been improperly solicited (App. Q). The Custodian did not find a single case that had been improperly solicited (see App. R). Moreover, the General Counsel for Respondent finally admitted that Respondent did not have a viable case with regard to the "solicitation" allegations (App. I-30). The Respondent's statement that the Motion to Conduct an Oral Hearing "raised the same issues" as the petition to revoke, p. 5, Resp. Bf., simply is not true (compare App. T, petition to revoke, alleging violations of the advertising rule to newly attached App. HH, the Motion to Conduct an Oral Hearing, alleging violations of the in-person solicitation rule). What this continued distortion by Respondent and its malicious prosecution in the revocation proceedings has caused Petitioner to do, is to file a direct attack on the Agreed Judgment, by way of a Bill of Review in the Texas state court (see App. II, Supp. App.).

Respectfully submitted,



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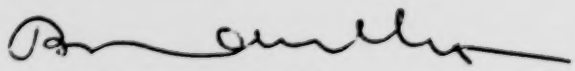
Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been forwarded to all counsel of record by placing same in the United States Mail, first class, postage prepaid on this the 16th day of November, 1989.



Benton Musslewhite

APPENDIX FF

AFFIDAVIT OF KATHRYN DIAZ

THE STATE OF TEXAS *

COUNTY OF HARRIS *

BEFORE ME THE UNDERSIGNED AUTHORITY, appeared Ms. Kathryn Diaz, known to be, who, after first being duly sworn, did upon her oath state, swear and affirm as follows, to-wit:

"My name is Kathryn Diaz. I am familiar with the facts and matters stated herein, and make this statement under my oath. I am a third year law student at South Texas College of Law. I was formerly employed by the law offices of Benton Musslewhite and I was requested by Mr. Musslewhite to investigate and determine what the normal length of time is for the processing of a civil appeal in the Fourteenth Court of Appeals of the State of Texas. That Court and the Clerk's office of that Court are located in the same building which houses the South Texas College of Law.

I discussed such situation with Ms. Barbara Elliott and others of the office of the Clerk of the Fourteenth

Court of Appeals, and from such discussions, as well as further investigation, I can now state that the average and normal length of time, with respect to appeals in the Fourteenth Court of Appeals, are as follows: the Fourteenth Court will, on the average, set a civil appeal for oral argument approximately nine months to one year after the briefs have been filed by both parties; following oral argument, the Court will normally take several weeks to several months to render its decision and file its opinion; the length of time for rendering the decision and filing the opinion varies in accordance with the complexities of each case."

S/ Kathryn Diaz
Kathryn Diaz

SWORN TO AND SUBSCRIBED BEFORE ME THE UNDERSIGNED AUTHORITY, this the 3rd day of November, 1989.

S/ Joan H. Hays
Notary Public in and for the State of Texas

My Commission Expires:

10/19/92

APPENDIX GG

NO. 86-44,452

THE STATE BAR OF TEXAS	*	IN THE DISTRICT COURT OF
	*	
	*	
VS.	*	HARRIS COUNTY,
	*	TEXAS
	*	
	*	270TH JUDICIAL
BENTON MUSSLEWHITE	*	DISTRICT

DEPOSITION OF

MARTHA BARHAM

July 9, 1987 Houston, Texas

DEPOSITION OF MARTHA BARHAM

taken on the 9th day of July, 1987, at 11:00 a.m., before Mary L. Johnson, a Certified Shorthand Reporter in and for the State of Texas, in the law offices of Eugene R. Hoyt, 3555 Timmons Lane, Suite 1010, Houston, Texas 77027, pursuant to Notice and the Texas Rules of Civil Procedure.

IT IS STIPULATED AND AGREED by and between counsel for the respective parties hereto that if the original deposition is not signed and filed at the time of trial, an unsigned copy may be used as if it were the signed original.

- - - - -

A P P E A R A N C E S:

For the State Bar Association:

Mr. Steven M. Smoot
First Assistant General Counsel
1414 Colorado Street
Austin, Texas

For Benton Musslewhite:

Pro Se
609 Fannin, Suite 517
Houston, Texas 77002

On the 9th day of July, 1987, at the law offices of Eugene R. Hoyt, 3555 Timmons, 10th Floor, Houston, Texas, MARTHA BARHAM appeared before me, Mary L. Johnson, Certified Shorthand Reporter in and for the State of Texas, pursuant to Notice and the Texas Rules of Civil Procedure.

IT IS STIPULATED AND AGREED by and between counsel for the respective parties hereto that if the original deposition is not signed and filed at the time of trial, an unsigned copy may be used as if it were the signed original.

- - - - -

MARTHA BARHAM,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. MUSSLEWHITE:

Q Okay. Would you state your full name,

Mrs. Barham?

A Martha Belle, B-e-l-l-e, Barham.

Q All right. And where do you now reside?

A 801 Alma, Tomball, Texas.

A . . . See, I've been arrested before. And, I --

Q Well, I appreciate your candor. I'm going to have to ask you about that.

A It doesn't bother me because, you know, I really was stupid and didn't know what I was doing, and I really didn't get in trouble. I got a probation for it. . . .

I met a girl there named Willie May Porter. She was 28 years old and had two children. And she made a life of -- you know how some people, they have a life that is illegal all the time. . . She said that she had been charging things at different stores and under $20 or $10, there is an amount

that . . .I would give her names of people that had credit of other stores.

Q I see. And she was using their names?

A Uh-huh. Or else if she came there--that's how it started out at first--she would just come to that one store and I would okay the credit.

Q Well, what you're saying is you got led down the primrose path by this woman?

A Well, I shouldn't. It was wrong, and I knew it was wrong, but I didn't know, you know, that people were thrown in jail and handcuffed and trials, I didn't know all that. I didn't know-- I had never --

Q Did someone finally catch up on what was going on and had you arrested?

A Yes. . . .

A I went to court and I was put on five years probation.

Q All right. So you pled guilty, no lo

contendre, or what?

A No, I pled guilty.

Q What did you plead guilty to?

A It was a felony, theft, or something like that. . . .

Q So you came back? How did you get the money to come back?

A Well, no. I got arrested again.

Q What for this time?

A Well, as -- when I grew up, my parents believed in sparing the rod would spoil the child, so we were whipped continuously by my aunt and by my father. Every little thing we did wrong -- and I remember one time I did stand up to my father, because they had a psychiatrist talk to me, and he just folded his papers -- but I just -- I didn't let anybody run over me. The first time I stood up to my father and my aunt. So he was not going to let me come back. We got in a fight and he

hit me and I stabbed him.

Q What did they charge you with?

A Assault with a deadly weapon.

A . . . And then I was 21 when I was--so this is -- in '63 my father came out to Oakland to get me because I stabbed Homer Taylor real bad. I'd like to have killed him.

Q A second time?

A No. I stabbed my husband the first time in the arm, . . .

Q He did not die?

A No, he did not die. . . . I remember I told him there in that little place we were painting, "I don't want to live here. I want to go home. I don't know -- you know, if you'll just help me get home," and I remember he threw a lamp at me and cut my hand real bad, the light bulb did. And he tore up all my clothes, even cut up an ironing board, and he was just -- "You're not

leaving," and standing in front of the door. And I went and got a knife and . . . . You know. And then his brother-- I don't know if they were going to let me stay there or not. All I know is that he turned his back. He was standing in front of the door and when he turned around, I stabbed him in the back with the knife and he fell on the floor.

Q They did not charge you on that case?

A Yeah, they charged me, but then --

Q The same thing, assault with intent to kill?

A And then I met Leon, my last husband in 1970.

Q That was Leon Barham.

A Uh-huh.

Q And you married him when?

A We never did get married . . . .

Q All right. You mentioned something about having shot Mr. Barham. When did

that happen?

A Well, after -- we had a little bit of problems there with his drinking because I -- I still got upset 17 years later about him being drunk as I did the first time.

Q Okay.

A And we were together quite a while before I actually got the feel of --

Q Figured out --

A -- being abusive and figuring out if he was on drugs or not. . . .

A So, at this time Leon was on drugs and I didn't know it.

Q All right.

A So, the first time I shot him, Carey was a little over a year old.

Q What was it -- I mean, was he drunk?

A He was drunk and he pulled a gun on me because he said I was supposed to pick him up somewhere -- it was all wrong. Everything that I was supposed -- he

made -- he came in mad at me because I didn't do something that I didn't know I was supposed to do.

Q I see.

A And he had this automatic pistol.

Q Uh-huh.

A And he was saying, "I ought to kill you," and I was real scared . . . . He laid the gun down to answer the telephone and when he did, I grabbed it and shot him . . . .

Q Was there another shooting incident?

A Well, I went to work. His sister helped me to get a job at Monterrey House right after that . . . Oh, before I shot him, he had pulled a knife on me. We were moving around a lot. We were always getting evicted from everywhere we lived . . . . The second time I shot him --

Q Was that after the second baby or before?

A No. No. Carey was about three years old.

Q Okay.

A And I stabbed him real bad. Because he pulled a knife on me, and -- he was drunk. He had that white stuff coming out of his mouth. I wasn't afraid of Leon. I knew him. I knew when to get scared. . . . He scuffled his money and he would maybe steal paint from Rodney and sell five gallons of paint or sell some of his father's tools or do odd jobs. He was smart at working and making money . . . . When I stabbed him, he had the knife and he cut me up. I have a big scar here, a scar down-- I was grabbing at the knife because I took the knife away from him . . . . I wasn't scared of him. And I almost cut my finger off . . . . He would just walk in and slap me out of the chair, you know, holding the baby. He

was just a -- he drank straight whiskey out of the bottle.

Q Well, you got the knife and you stabbed him.

A So I got the knife away from him and when he started to run, I stabbed him.

A . . . . So that's when his father got us the trailer. The song, "When the Roll Is Called Up Yonder,'" and he was picking on my guitar and making fun, and he was drunk.

Q I see.

A And I just had had enough, you know . . . . And I shot him that time.

Q That's the time you shot him twice?

A . . . . The police never would make him stay away from me, because they said he had a right to come in the house and--

Q Being your husband, common law --

A And they'd tell me. "Why don't you go take another pill," because I was, you know, a hysterical freak. I got to be

a mean person. I got to be hard. I was tired and weary.

Q And things were still bad; he was still drinking?

A I run -- it got to where I more or less run him off. He'd come in drunk and I'd say, "Hit the road." He got really afraid to stay with me when he was drinking . . . . I'd tell him. "Look, you better get me some money because you're going to have to leave town. Because I did shoot him twice on Breen Street. We lived on Breen, too, there on the corner in a trailer.

Q Are these times other than --

A No, this was before I left him, and this is before we got out of the trailer, because I shot him --

Q No. What I'm asking, are these times that you shot him you haven't already told me about, these other times?

A No. I shot him one more time when I

lived in that trailer . . . .

Q Well, did you -- did you have to shoot him again after that?

A Once.

Q Once. And you were still living on Breen Street?

A This was after Carey got run over . . . . I got in a cop car and I told him-- after he shot me -- my window out riding down the street -- I told him, "I want him arrested." And they said, "You got to wait until Monday," which this was probably a Friday. It always happens. To file charges, go home. And I didn't have any bullets for my gun or anything . . . . He told me, "Get out of my car or you're going to jail," and I go, "Well, you take me to jail." And they drove me around the neighborhood until I borrowed money to go get me some bullets for my gun. And, sure enough, when I went home,

there he was in my trailer.

Q What happened?

A I shot him as soon as I saw him.

Q Did he -- where did you hit him this time?

A In the leg. I shot him in the head before. he was trying to break in -- I shot him right in front of the police one time.

Q I don't -- how many times would you say -- if you can just give me an estimate and go on with this other matter-- that you shot --

A Seven times.

Q Seven times, seven different times . . . . Okay. Now, where did you meet Mrs. Eunice White?

A She lived around the corner from me on Breen Street.

Q Okay. So you all lived close by to each other all during the time you lived on --

A . . . . Ms. White and Cindy is around my age, and we were friend, and-- actually I didn't really know anyone that close . . . . So, they helped me. I ate Christmas dinner with the Whites, and they just kind of looked after me. . . . Well, I knew that they (the Whites) were always filing suits.

Q Right.

A And I think Donald Tatum, Cindy's husband, had a suit with you.

Q Well --

A I don't know what it was about, or Cindy had a suit with you. You were representing her on some little charge with Melinda Thompson's dad. They had had a family fight or something, and you were their lawyer.

Q Uh-huh. All right. Go ahead.

And so Ms. White, or Cindy, which one of them mentioned that to you?

A Mentioned your name to me? Who

mentioned your name?

Q Yes.

A Well, I think both of them together around the table.

A I went to Merrick and asked him to help me get a car.

Q That was --

A The man that ran over him.

Q Mallick.

A Mallick . . . . And I went in there. I was sort of desperate you know, and I told him I needed a car. I couldn't work. I couldn't get to the hospital. I was -- I don't know how I got to the hospital once a week. I did it. You know, I just begged, borrowed, bummed-- and he was real rude. He said, "Well, I can't do that. It's not my fault," you know. . . . and he told me right to my face that Carey could see he was going to get run over and took off running . . . . He ran in a

straight path and the truck caught him with his hand sticking out. He told me that.

Q Uh-huh.

A Then he said he wasn't going to help me get a car, that he couldn't, that he didn't really own the business. There was other people. And I thought, "Well, I've got to get a lawyer." And in my mind when you sue somebody, I was going to get a lawyer, go to court--they were bugging me for bills. . . .

Q . . . Did you get upset with Mr. Mallick and say anything that might be considered a threat?

A No.

Q There's been some indication at a time or two that maybe you did give him the feeling that you were threatening him. Would he be wrong if he said that?

A Yeah, I never threatened him . . . . And I was probably raggedy looking,

you know, 20 pounds lighter than I am now. I was probably crying. I was real bitter. I had jumped to, you know, like --

Q You were upset.

A I think I told him that I was just going to have to sue him then, that I thought he owed me some kind of help for the shape that I was in, and he had promised me . . . . But I didn't want to take any help from him at the time. . . . In fact, I was only in his office about five or ten minutes. . .

Q Were you all alone?

A Uh-huh.

Q Okay. Well, all I'm saying, some people can construe things in different ways than what people mean; and you said you were nervous, you said you were upset and a little bitter about everything because it had all happened --

A It was just grasping. I knew if I had a car I could get around. See, I was so tired of hauling this water. I had no utilities.

Q Uh-huh. And is it possible that, under those circumstances, and you answer this any way you feel comfortable --

A I don't recall threatening him.

Q I understand. Is it possible that you could have said something because you were so upset that he might have construed as being a threat? Is that possible?

A It is possible. It certainly is. Because I did --

Q You were upset.

A I did have a way of telling people, you know, to get the hell of my life. I just -- I was tired -- I was getting more and more bitter.

Q All right.

A I was having trouble with my landlord

at the time. They wanted me out. I mean, they pulled my meter out of my-

Q Is this the Breen --

A This is the Moleys. They were -- and I told Judge McElroy that, too. See, they would run down and file charges on me.

Q Uh-huh.

A Saying I cursed them and this and that. Actually they were the ones doing it.

So I paid a fine the first time. . . .

Q Uh-huh.

A Well, he put me in jail because we got in a cuss fight.

Q When was that, approximately?

A About September or October of '80, right before I hired the lawyer . . . . And that's -- so I paid the first fine, seventy something dollars. I just pled guilty.

Q To what? To misusing the water?

A Assault by threat.

Q Oh, assault by threat.

A Abuse. Yeah. Because he was -- I'd look out my back door and he'd be standing there with a shotgun.

Q Uh-huh.

A Not threatening me or anything, but Letting me see -- I mean, "You don't scare me, you S.O.B." I did curse him. I'll be honest with you, and he cursed me . . . .

Q Okay. Now, let me ask this: When did you first have contact with anybody or me or my office?

A Cindy and Ms. White -- I had discussed hiring a lawyer, and evidently you were working on a case for Donald or Cindy, and they were seeing quite a bit of you at the time.

Q . . . . I mean, they make appointments for me and I know about them, but what I'm trying to say is the first time you

met me was about three months after this first conversation; is that right?

A Uh-huh, about three months.

Q Now, that day you came to the office on Travis Street, and you actually met with me?

A Uh-huh. The first time I ever saw you.

Q Okay. And what happened at that meeting? . . . At that time did you have a release from Mr. Sherrod?

A I had everything that day because I couldn't Make very many trips. I told you that on the phone.

Q Okay. Did that include the file from Mr. Sherrod and so forth, the release from him?

A Uh-huh. Uh-huh.

Q Did you sign -- is that the day you signed the power of attorney?

A Yes.

Q Or a contingent fee agreement?

A Yes.

Q Okay. Now, after that -- I believe you told the Grievance Committee that you tried to get a hold of me a number of times and couldn't; is that correct?

A . . . . I had difficulty reaching you.

Q All right. Do you know, just so we can get some estimate, did you keep track of any times that you called or dates that you called?

A No. There would be periods where it would be every day, two or three times a day. Then things would get better for me, and it'd be months or a year before I called you.

You had told me it would be two years before we could do anything, and I was prepared to sit back quietly and wait two years, until somebody told me it was a year that the statute of limitations ran out.

Q I see.

A So I started calling you again in

August of '82 . . . . And the only way I got you to return my call then is I threatened a grievance. And you called me at Stuart and Laura's house. I was staying with them then. I had had more problems with Leon . . . . And I started calling you then. I may have asked -- I don't recall ever asking you for a draw until about the Toyota. You were supposed to help me get the side note.

Q Okay. Did you ever talk to a girl named Brenda Edwards (of Musslewhite's office)?

A Not that I know of.

Q A girl named Brenda? She has indicated that you talked to her a number of times.

A Probably have. Whoever you had working up there. It was several different people. Barbara was the main one.

Q Barbara Wilkins?

A Uh-huh . . . . You told me to come down to your office, which was on Wirt Road then.

Q Okay. Did you come down?

A Uh-huh. Chuck took me.

Q Did I dictate it (the Petition) while you were sitting there?

A Uh-huh.

Q I do that quite often. Did I dictate it while you were there?

A . . . . You said that you were in the process of moving.

Q Oh, all right.

A And the air conditioner was out. You did have boxes of files. You didn't have your office in order. I don't know when you moved in . . . . It was -- you know, you were very nice. You apologized for her . . . . And you started dictating the petition. Is that what you call it?

Q Yes.

A . . . you told Van, "Be sure you get this down by such-and-such a date," and you were really giving him orders . . . .

Q . . . . Then when did you next see me or meet me?

A You were on Fannin then.

Q Okay.

A I had tried unsuccessfully to call you.

Q And when was -- was that about the-- when you wanted the advance?

A When I wanted $200. My life was getting back together pretty good, and I had financed the car and gotten a little credit. And I had this side note when Carey had another accident. He got poked in the eye.

Q Huh-huh.

A And I called, so it had to be in '82 or '83.

Q Okay.

A '82. I called you around the latter

part of '82 because Leon was going back to prison and I was trying to see when the case was going to trial, and I wanted -- I always called and said when I moved. I had moved to Magnolia.

Q Generally were you still talking with Barbara or --

A Jane, is that her name?

Q Jane Hayes. You talked to her some?

A Yes.

Q Did you ever talk to Brenda, ever recall talking to her?

A I think so.

Q Okay. All right.

A I started having problems again in '83.

Q Okay.

A I called you.

Q All right.

A Threatened with a grievance. You called me back.

Q Well, let me ask you this: Did you-- did Mr. Leon Barham have authority from

you to call me about money?

A Well, I knew he called you.

Q . . . . So you knew that he was calling, and if I told you he was calling making some threats about money, you were not there when he did that?

A No. He didn't live with me.

Q All right. But he knew my number, so far as you knew?

A Yeah.

Q And we've got records where he called up, and people, he told this and that.

A Well, he didn't believe that I couldn't get in touch with you.

Q Oh.

A I said, "Well, you just call up there and see how hard it is to get a hold of him." And he did it, too.

Q All right. Did you ever talk to me again prior to filing your grievance, that you recall? . . . What happened on

Wednesday?

A You told me that day your bookkeeper was out, which I think you said it was Jane.

Q Okay. Was I there?

A Yes. . . .

Q Okay. Then what happened?

A I came back on a Wednesday without calling . . . . I went in and you told me you had loaned out a bunch of money and now you had to get approval from them before you gave me the $200.

Q All right.

A And you gave me $10 for gas. I was quite upset.

Q Okay.

A And I went home, and I never talked to you again until the grievance was filed.

Q All right. When you -- after you filed your grievance, did you -- there was some indication in your testimony about

-- do you recall getting a message from me or from Mr. Hoyt that I was asking him to handle the case in view of the fact that you had filed a grievance?

A Yes. I think that's the first time I talked with Mr. Hoyt, after the grievance was filed.

Q I understand that. That's why he called you, because I just felt like there might be a problem there.

There was some indication somewhere that you did not agree for Mr. Hoyt to represent you. After he talked with you, did you have any disagreement with him going forward to get the case completed?

A He told me he was going to be handling the case.

Q Well, did that -- I mean, did you have a problem with that?

A No. . . .

Q Okay. Well, whatever the medical bills

were, Judge Hoyt said that they were low compared to what -- is that what he told you, that they were low compared to what you might try to get from a jury?

A He said I'd probably end up getting nothing if I went in front of a jury, that I better take what I could get. . . .

Q Eventually did the Court appoint a guardian ad litem? do you know what I mean by that?

A . . . . Oh, yes, they did. Okay, I'm sorry.

Q That's a term before a case can be settled.

A He explained that to me.

Q Okay. You didn't have any problems with that, did you?

A What do you mean by "problems with that"?

Q With the Court appointing a guardian ad

litem. I mean, you did not disagree with that?

A No. No. It was a normal procedure, he said. They had to check my son. It was for my son's behalf.

Q That's right. Did he tell you that you can't settle a case involving a minor without getting a guardian ad litem to review to see whether it's fair?

A Huh-huh. Yes.

Q Did you ever talk to the guardian ad litem yourself?

A I met him the day of court.

Q Judge Hoyt said he recommended settlement -- I mean Mr. Hoyt; is that correct?

I call him "Judge" sometimes because he's a former judge, but his name is Mr. Hoyt.

Did he tell you he recommended the settlement?

A Uh-huh.

Q Okay. Did you eventually come -- you and Carey come to court and the settlement was approved by Judge Smith?

A Uh-huh.

Q Is that correct?

A Yes.

A I thought he (Judge Hoyt) worked in your office with you, because I talked to several lawyers in your office. In fact, there was another one that was going to represent me one time, Sobel or Sewell.

Q He did work in my office. But what I'm asking you is: He did tell you that if you didn't take the settlement and we tried it, I would try the case for you if you wanted me to; he did tell you that?

A He told me I'd probably get nothing.

Q Excuse me. Listen to my question. I'm not trying to be argumentative.

He (Judge Hoyt) did tell you, did

he not, that if you didn't take the settlement, whatever he thought about the value of the case, if you didn't take the settlement, that I would stand by my word and try the case?

A I don't recall him ever saying that to me.

Q Well, nobody ever told you I would not try the case, did they? I remember I told you I would try the case --

A Uh-huh.

Q -- when you first hired me. Nobody ever told you, "Benton Musslewhite said he isn't going to try your case"?

A No. No one ever said you would either.

Q Well, I told you I would, didn't I?

A Uh-huh.

Q . . . . In any event, Judge Hoyt, from what you're saying -- Mr. Hoyt seemed to recommend, told you that you -- he was talking about, I guess, the liability phase of the case as to the

jury might find that there wasn't any negligence on the part of Mr. Mallick. Did he tell you that?

A Uh-huh.

Q And that's why you might get nothing; is that what he told you?

A Yes.

Q . . . . But eventually it was settled after you had some difficult times getting to court, you did make it to court, you and Carey; is that correct?

A Uh-huh.

Q And the guardian ad litem was there?

A Yes.

Q And the Judge was there?

A Yes.

Q And I was there?

A Yes.

Q And Mr. Hoyt was there?

A Yes. And Mr. Ellis.

Q And Mr. Ellis for the defendant was there.

A Yes.

Q Did you -- and you did agree to the settlement?

A Yes.

Q Let's go to the first time you met me in the office.

A Uh-huh.

Q I never did tell you, "I promise you that I will get $250,000," did I, Mrs. Barham?

A You told me that you never get what you ask for, but you ask for a whole lot more than what you normally --

Q Get.

A -- get. And you were going to ask for a quarter of a million dollars.

Q In any event, all I'm just trying to say, I never did when you met me face-to-face promise you that I'd get you $250,000?

A No.

Q Well, there was some implication (in

the phone conversation) that I offered you money not a part of the settlement. That's what I'm --

A No. It was -- you told -- this is the best I can remember.

Q All right.

A You had called me after the grievance was filed but before I had testified. I think maybe it was when you first heard about it. I don't know.

Q All right.

A And you told me that you were on your way to New York.

Q Uh-huh.

A You were calling me from the airport.

Q All right.

A That the case was going to be settled in September. I think that was the first month.

Q Uh-huh.

A And that the grievance -- since I had filed a grievance, it kept you real

busy running back and forth -- that's when you asked me did I want a jury trial or just take the money from the judge.

Q Uh-huh.

A . . . . So I said, "Well, what do you think I should do?" "Well, I don't know. I'll be happy with anything you decide." I go, "Well, what would be best?" I never could get an answer from you.

Q I can't make that decision for you; but, anyway, let's not argue.

A Well, you're my lawyer. You know whether we should have a jury trial or go for the judge. I don't.

Q I gave you a recommendation, Ms. Barham, do you recall that? All I can do is recommend, and I did give you a recommendation . . . . Is that the extent of the conversation that you recall?

A Yeah, because nothing -- I was afraid you were going to ask me about the grievance, but you didn't . . . .

Q Now, were there any other conversations that you can think of that you had with me?

A No.

Q . . . . But in some of those calls leading up to that, you don't deny that Mr. Barham could have said that (threatened a grievance if a loan was not made) . . . .

A I have no idea what he said.

Q All right.

A It wouldn't surprise me, anything . . . .

Q Have you discussed that with anybody, Mr. Hoyt or, anybody else, drawing money against the fund, against the money in the registry of the court for the benefit of your son?

A Not for the benefit of my son. My son

put $2500 worth of phone calls on my phone calling his girlfriend, and I asked Mr. -- I'm still having trouble with my son, and I asked Mr. Hoyt did he think a judge would --

Q Let you recuperate your --

A Make him pay the bill. But I couldn't do that, because that's all he has, you know. I was just threatening my son with that. I go, you know, "I'll just take your money. The Judge said I could do it, and you're going to pay your $2500 phone bill."

A I was threatening him with that, and he was standing there and . . . .

Q . . . . And, as a matter of fact, the day of the settlement, your son in your presence, if you recall, asked me if he needed some money, how to do it; and I said you have to get a court order. You remember that down at the courthouse?

A Uh-huh. I told him if he put anymore phone calls, I was going to take all of the receipts to the Judge, that I had hired me a lawyer, and I was going to get the Judge to take every bit of that money and pay. He even left school and had -- went and had caps put on his teeth without my authorization, and the dentist did it. And I had to pay for that. I shouldn't have, but I did.

Q How old is he now, Ms. Barham?

A Fifteen.

Q Fifteen. I believe that's all the questions I have.

NO. 86-44,452

THE STATE BAR OF TEXAS	*	IN THE DISTRICT COURT OF
	*	
	*	
VS.	*	HARRIS COUNTY, TEXAS
	*	
	*	270TH JUDICIAL
BENTON MUSSLEWHITE	*	DISTRICT

DEPOSITION OF

MARY ANN MERRITT

July 9, 1987 Houston, Texas

DEPOSITION OF MARY ANN MERRITT

taken on the 9th day of July, 1987, at 2:00 p.m., before Mary L. Johnson, a Certified Shorthand Reporter in and for the State of Texas, in the law offices of Eugene R. Hoyt, 3555 Timmons Lane, Suite 1010, Houston, Texas 77027, pursuant to Notice and the Texas Rules of Civil Procedure.

IT IS STIPULATED AND AGREED by and between counsel for the respective parties hereto that if the original deposition is not signed and filed at the time of trial, an unsigned copy may be used as if it were the signed original.

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A P P E A R A N C E S:

For the State Bar Association:

Mr. Steven M. Smoot
First Assistant General Counsel
1414 Colorado Street
Austin, Texas

For Benton Musslewhite:

Pro Se
609 Fannin, Suite 517
Houston, Texas 77002

MARY ANN MERRITT,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. MUSSLEWHITE:

Q First, for the record, let's -- state your full name for the record.

A Mary Ann Merritt.

Q Okay. Ms. Merritt, did you recall seeing in 19 -- early 1986 a -- or Maybe in late 1985, December of '85, an article about a case that I had been involved in and had gotten a verdict for a lady who had a gastric reduction type of operation?

A It was in approximately January or February of '86.

Q All right. And after seeing that article, did you call my office or call somebody and --

A Yes, I did.

Q And did we eventually see each other?

A Yes.

Q Then we talked by telephone and didn't we meet at this place that had the TV out there in the Village?

A Nick's.

Q Okay. And then at that meeting, did you not at that time sign some sort of power of attorney or retainer agreement?

A Yes, I did.

Q . . . . At that meeting you made it clear to me, did you not, that your operation that you then felt like it had caused you some problems had taken place more than two years before we met?

A That's correct.

Q . . . . Basically, though, what I'm saying is, at the conversation with me, you told me about the operation that

Dr. Dudrick had performed. It had Not worked. That is, it had not been successful; is that correct?

A Well, considering when I had the operation I was 105 pounds, and at that time I was a hundred and forty something, no.

Q . . . . Ms. Benage then, did you not tell me, made you aware of the fact that this doctor had not -- had possibly been the cause of you not being able to -- or, rather, it might have been negligence on his part that caused you not to have a successful operation? Do you remember discussing that, or Ms. Benage made you aware of the fact that he was being sued, and this --

A Yes.

Q -- brought to mind, "Well, maybe I've got a lawsuit"? Is that correct?

A Uh-huh.

Q And it was not long after that you talked to me; am I correct?

A Yes.

Q Okay. And after that conversation that night at the place in the Village, and you signed some sort of paper authorizing me to act, you then tried to call me on the telephone?

A Well, the point of you having me sign-- you said that you didn't know if I had a case at that point, but to go ahead and sign the power of attorney because that would save me a trip downtown in the event that I went home and found the information you told me to look for and supplied you with it, if it fell into the category that you stipulated to me, as I had understood.

Q All right. Anything else you recall about the conversation with me other than just explaining to me what happened?

A No, except that, you know, you told me to go home, and you said it was very important that I find out the last time that I had been to see the doctor.

Q . . . . I'm trying to get your recollection of what your instructions were following that meeting. to go ahead or --

A Well, it was rather haphazard. It's kind of difficult to reconstruct the meeting because there was a lot of coming and going. Basically I think we only met about ten minutes that was actual -- you discussed the discovery rule.

Q All right.

A . . . . And as I was finishing up, someone from your office called me and said that he was just touching base. I'm sorry. I don't remember his name. To see whether or not -- he was preparing the letter of notification

and he was calling to see whether or not I still wanted to pursue with the case.

A . . . . And I said, "No. I don't want anything sent out at this point." I said, "If he wants to make a deal with -- at that time I think I said John O'Quinn or, you know --

Q Right.

Q (By Mr. Musslewhite) Okay. Now, anyway, and did you not tell somebody in our office that in view of that publicity (disciplinary proceedings publicity) you'd rather I not handle the case?

A No. I said in view of all of the overall facts, mainly what had happened to me, you know, plus the gentleman calling me and the letter of notification having not been written, plus the publicity, I said, you know, I would have to be a fool to continue

along the same lines. . . . Even if I did like you.

A . . . . I remember discussing me having another attorney.

Q You don't recall me, Ms. Merritt, calling you and asking you what was happening with your case, that I wanted to be sure, that according to my file January 1988 would be --

A Okay. I'm sorry. You are correct in one thing. You spoke with my mother.

Q Oh, I'm sorry.

A I was out of town.

Q Okay. You're right.

A And then I returned the call.

Q You returned the call. Okay. Now, do you mind saying for the record who your lawyer is? I'm not -- just so we have it clear that you got a lawyer and you're being represented.

A I have a lawyer.

Q All right. And he is handling that

case, the case that we discussed, the one that you told --

A Unless I fire him.

Q (By Mr. Musslewhite) Can you think of any other conversations with me that you haven't told me about?

A With you?

Q Yes.

A I can't recall.

Q All right. As I understand it, you first filed a grievance because you couldn't get in touch with me, basically, to follow up on what we had already started.

A Well, and as I understood it. . . .

Q . . . . Have you got anymore complaints about me?

A (Laughing)

Q I want you to feel comfortable and say what you want to say. Now is the time to do it if you want to say something. I'm not trying to intimidate you.

Mr. Smoot's not. Nobody is. Do your thing.

A No. I mean, I do have to clear up something about where the case stands now, because I am not really sure where it stands.

Q Let me say, number one, I'm not your lawyer now. You know that.

A Well, no, but you wee asking me, . . .

A Well, when I talked to the attorney that I now have, first of all, I talked with his partner and I think the case got dumped on him, which I'm sure probably didn't sit too well with him. And his comment was, he said, "I could see holes in this right and left," you know, and the way he said it, there weren't that many merits in it. And I said, "Do not go forward with the case until we discuss a dollar amount, because it's not worth me going through all of this for nickels and dimes. I'm

not in it to skin anybody's hide or anything like that, but it's just not worth the, you know, it's just not worth it if it's not going to be for something substantial.

Q Substantial. I understand.

A You know, because it's going to cause me More grievance going through it than I've already gone through, and I said, "Don't proceed." So he was supposed to get with his partner and get back with me. And we've had a very -- well, anyway.

Q Difficult time getting back together?

A Yeah. And, you know, all this has come up, and I really don't know what I was supposed to discuss here because I had cases pending, and what I wasn't; and since I had a lawyer that said he had more important things to do than sit in his office and talk to me on the phone, since I had talked to him twice.

Q You're not talking about me on this one?

A No. I'm talking about Donovan, John Donavan.

Q John Donavan.

A Honey, if you want to find out all the bad lawyers -- not bad, just confused--

Q I want to say something. You're not getting a very good impression of lawyers, are you?

A -- you just turn me loose, because I can fleece them out.

Q All right.

A But -- so I got disgusted because I felt that he didn't feel like there were any merits anyway; and I think we discussed this on the phone.

Q You did tell me this.

A You know, I just kind of got, you know, I just got fed up with it, and I was going through all this and I just, you

know -- if the attorney isn't a hundred percent for you, and you're not paranoid by being a little bit intuitive -- you've got the cards stacked against you before you ever go in. And I just had decided that I didn't think it was worth pursuing.

Q Do you know whether Mr. Donovan has filed suit for you?

A He has filed suit.

Q . . . . When we first talked, didn't I tell you that I was hard to reach on the telephone? Did I say something about that to you at Nick's, and to please be patient with me? If you don't recall, don't answer.

A I recall more the laughing going on from the basketball game than I -- I don't know.

Q Okay.

A I'm not saying you didn't say it. I'm saying I don't recall.

MR. MUSSLEWHITE: All right. No further questions.

APPENDIX HH

NO. 86-44452 (CONSOLIDATED)

THE STATE BAR OF TEXAS	*	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
VS.	*	
BENTON MUSSLEWHITE	*	270TH JUDICIAL DISTRICT

NO. 87-24402 (CONSOLIDATED)

THE STATE BAR OF TEXAS	*	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
VS.	*	
BENTON MUSSLEWHITE	*	151ST JUDICIAL DISTRICT

MOTION TO CONDUCT ORAL HEARING

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW HARTLEY HAMPTON appointed Custodian of the law practice of Benton Musslewhite by this Court on January 19, 1988 and the State Bar of Texas, and file this Motion to Conduct Oral Hearing and in support thereof would show as follows:

I.

Movants have received oral reports, and news articles have been published by the

Associated Press, Reuters news services and Scottish publications, which call into question certain activities of Benton Musslewhite. Specifically, those reports and news accounts accuse Mr. Musslewhite of soliciting the survivors of the Piper Alpha tragedy to employ him to represent them in wrongful death or other types of tort actions.

If these accounts are true, Mr. Musslewhite has violated this Court's Judgment of January 29, 1988. . . .

Given the potential gravity of the situation, Movants would ask that this Court conduct an oral hearing and receive testimony concerning Mr. Musslewhite's activities in Scotland . . . .

WHEREFORE, premises considered, Movants pray that this Court enter an Order by requiring Benton Musslewhite to appear at an evidentiary hearing to testify, under oath, concerning the circumstances of the

above described events, and that this Court further order Mr. Musslewhite to produce the materials herein described.

Respectfully submitted,

By S/ Hartley Hampton

Hartley Hampton
YOUNG AND HAMPTON
State Bar No. 08874400
1301 McKinney, Suite 400
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S/ Steven M. Smoot

Steven M. Smoot
First Assistant
General Counsel
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APPENDIX II

CAUSE NO. 89-048801

BENTON MUSSLEWHITE	*	IN THE DISTPICT
	*	COURT OF
	*	
VS.	*	HARRIS COUNTY,
	*	T E X A S
	*	
THE STATE BAR OF TEXAS	*	269TH JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

COMES NOW Benton Musslewhite, hereinafter referred to as "Plaintiff", complaining of the State Bar of Texas, hereinafter referred to as "Defendant", and for cause of action would respectfully show the Court as follows, to-wit:

I.

Parties.

Benton Musslewhite, the Plaintiff herein, is a resident of Harris County,

Texas. The State Bar of Texas is a agency created by the State Bar act, Title 2, Section G of the Tex. Government Code (Vernon 1988 [The Texas State Bar Rules are reprinted in Appendix to Government Code, Title 2, Sect. G.]), and may be served with process by serving the general counsel, Steven Peterson, at his office in Austin, Texas.

II.

Subject Matter of Suit.

This is a suit brought directly in law and equity under the State Doctrine of "Bill of Review", attacking a Judgment entered in the 270th Judicial District Court of Harris County, Texas in the case of State Bar of Texas v. Benton Musslewhite, Cause Nos. 86-44452 and 87-22402 (Consolidated), 270th and 151st Judicial District Courts, respectively, said Judgment having been entered on the

29th day of January, 1988. Said judgment arose out of a compromise and settlement, all as hereinafter described, and will be, throughout this Petition, referred to as the "Agreed Judgment". The basis for the Bill of Review is that such Agreed Judgment was procured by the fraudulent representations, misrepresentations and fraudulent omissions of the State Bar of Texas and/or said Agreed Judgment was procured as a result of the mutual mistake of the parties, and/or the Agreed Judgment is void or voidable as being in fatal conflict with the Texas and U.S. Constitution and other statutes and laws of Texas.

D. The Fraudulent Representations or Conduct of the Defendant.

The representations, acquiescences, silences (when it had the duty to speak) and other conduct of the Defendant and its

representatives, led the Plaintiff to reasonably believe that the Agreed Judgment meant the following:

(1) That with regard to any future attempt to revoke the probation, if such grounds involved any alleged new violation of the Disciplinary Rules, Plaintiff would be entitled to have those alleged new violations processed through the Grievance Committee and thence would have the right of trial by jury, all as provided for in Sections 10 through 23 of Article 10 of the State Bar Rules.

(2) That the Agreed Judgment did not require Plaintiff to give up his modus operandi of holding press conferences in connection with controversial, high-visibility, mass-disaster and toxic tort litigation.

(3) That neither the Agreed Judgment

nor the Disciplinary Rules would prohibit the Plaintiff from discussing the handling of cases with other lawyers, by way of direct solicitation or by way of public communications (targeted to such other lawyers).

(4) That, in the event a petition for revocation of probation were filed, Plaintiff would be accorded the benefit of all the Texas Rules of Civil Procedure, including Rules 99 and 245, which give Plaintiff until the first Monday after the expiration of twenty (20) days after date of service of such petition before Plaintiff would have to respond and which would require at least ten (10) days notice of any setting of the trial upon the merits, after the Plaintiff had entered his appearance.

(5) That, in the event any petition

for revocation of probation were filed, Plaintiff would have a reasonable time in which to engage in discovery, all as specifically stated in the Agreed Judgment and as provided for in the Texas Rules of Civil Procedure.

(6) That in complying with the so-called "Referral Clause", it would not only be proper, but required, that Plaintiff become "employed" by way of the execution of a power of attorney or attorney employment agreement, before referring the case to another lawyer.

(7) In complying with the Referral Clause, the Plaintiff, after the referral was made, would, as long as the lawyer to whom the case was referred would case manage the case and maintain the file in his office, be allowed to perform work upon the case at the request of the lawyer to whom

the case was referred.

(8) That, in dealing with the Plaintiff, the Defendant would always respect and not violate the Constitutions of the United States and Texas.

(9) That, in dealing with the Plaintiff, the Defendant would not violate, or expect the Plaintiff to violate, any other laws or statutes, including other disciplinary rules such as DR 2-107.

(10) That Plaintiff would not have to disclose the probation and the terms thereof every time he uttered a public or private communication, unless a potential client or attorney for such client raised the question of potential employment; it would only be in the latter situation that Plaintiff would have the duty to disclose and discuss

the probation and its terms.

(11) That Defendant would not attempt to regulate any public or private statements made by Plaintiff directed to an audience that was "sophisticated" enough to make reasonable verification of any statements made by the Plaintiff (excluding of course in-court communications or conduct).

(12) That Defendant would not prosecute Plaintiff for the conduct of other attorneys, who were not in the employment of the Plaintiff or over whom Plaintiff had no power or right to control their conduct.

G. <u>The Actions of Defendant Constitute Fraud and/or Mutual Mistake and/or Render the Agreed Judgment Void and/or Voidable on other Grounds</u>.

The actions of the Defendant State Bar

of Texas, alleged under par. F above, were totally contrary to the representations, conduct and actions of the Defendant prior to the execution of the Agreed Judgment, on the basis of which the Plaintiff agreed to enter into the Agreed Judgment. The above and foregoing actions on the part of the Defendant State Bar, establish that the representations and actions of the Defendant, leading up to the execution of the Agreed Judgment were fraudulent; constituted fraudulent misrepresentations; constituted fraudulent omissions; and/or established that the entire Agreed Judgment was induced and executed as a result of mutual mistake and/or mistake on the part of the Plaintiff. Such actions and conduct on the part of the Defendant establish, particularly in the context of the Constitution of the United States and the law of this State, that the Agreed

Judgment is rescindable, void, voidable and/or of no effect for the following good and sufficient reasons:

(1) Said Agreed Judgment was induced by the fraudulent representations and/or actions and/or fraudulent silences of the Defendant.

(2) Said Agreed Judgment was induced by undisclosed materially prejudicial intentions on the part of the Defendant.

(3) Said Agreed Judgment was the result of the mutual mistake of the parties.

(4) The Agreed Judgment was a result of the reasonable mistake on the part of the Plaintiff.

(5) The Agreed Judgment is void because the Referral Clause, as it is construed by the State Bar of Texas, violates DR 2-107 of the Disciplinary

Rules.

(6) The Agreed Judgment is void or voidable because it violates DR 2-108, which prohibits any agreement restricting an attorney's right to practice law (the Agreed Judgment does do this with regard to the probation, the Custodian and the Referral Clause).

(7) The said Agreed Judgment is void because it contains punishments and restrictions upon Plaintiff which are not permitted by the State Bar Rules (particularly the Referral Clause and Custodian restrictions). See State Bar of Texas v. Edwards, 646 S.W.2nd 543 (Ct. of App., Houston [1st Dist.] 1982) ref. n.r.e.

(8) The Agreed Judgment is void because it permits the State Bar to violate the First Amendment of the Constitution of the United States (if

the construction of the State Bar is to be accepted) by punishing Plaintiff for the exercise of his right to hold press conferences and engage in free speech.

(9) The Judgment is void or voidable because it permits the State Bar of Texas to violate the Due Process clause of the Constitution of the United States, if applied as suggested by the State Bar, because it allows the State Bar to prosecute the Plaintiff in a revocation proceeding without adequate notice, without allowing him time for discovery, without allowing him time to get an attorney and without giving the Plaintiff the required notice of trial on the merits of the revocation proceeding was set.

(10) The Agreed Judgment is void or voidable because it violates the Due Process clause in that, as construed by

the State Bar, it deprives the Plaintiff of the right to a hearing before the Grievance Committee and a right of trial by jury, on any alleged new violations, as provided for in Sections 10-23 of Article 10 of the State Bar Rules. Thus, as rights created by State law, the failure of the Agreed Judgment to accord Plaintiff those rights, violates the United States Constitution. See Logan v. Zimmerman Brush Company, 455 U.S. 422, 71 L Ed 2d 265 (1982).

(11) The Agreed Judgment is void or voidable because, as construed by the State Bar of Texas, it allows the State Bar to selectively prosecute the Plaintiff in violation of the Equal Protection and Due Process clauses of the Constitutions of the United States and Texas.

(12) In a general sense the Agreed Judgment is void or voidable because, as construed by the Defendant State Bar, it allows the State Bar to effectuate a prior restraint upon free speech on the part of the Plaintiff, in violation of the First Amendment of the Constitution of the United States, the Due Process clause, and the Constitution of the State of Texas.

(13) The Agreed Judgment is void and/or voidable because, as interpreted and enforced by the Defendant, it violates the Vagueness doctrine, and the constitutions of the U.S. and Texas, in three respects: (a) the Referral Clause, which did not provide the mechanics for "referring cases", was, as construed by Defendant given an ex post facto and vague impact; (b) the construction of the Agreed Judgment by

the Defendant, so as to preclude a jury trial and grievance committee review, renders it unconstitutionally vague; and (c) the Defendants construction of DR 2-101, as a vehicle to enforce the Agreed Judgment, so as to make communications to other lawyers subject to discipline and thus a ground for revocation, renders DR 2-101, and thus the Agreed Judgment, unconstitutionally vague.

With regard to all of the above, the Plaintiff would not have entered into the Agreed Judgment had it known that the State Bar would take the positions it took with regard to the revocation proceedings and the Plaintiff would show that he was induced to enter into the Agreed Judgment by the fraudulent representations and actions of the State Bar, by mutual mistake and, by the manner in which

Defendant procured such Agreed Judgment through the use of such undisclosed prejudicial intentions.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays the State Bar of Texas be cited to appear herein as required by law and, upon hearing and trial hereof that the Plaintiff have judgment rescinding and declaring void the Agreed Judgment and all proceedings stemming therefrom and/or in the alternative reforming the Agreed Judgment as requested in this petition; furthermore, that the Defendant be ordered to show cause, if any it may have, why a temporary injunction should not be issued, and, upon the hearing, that the Court grant a temporary injunction, enjoining the enforcement of the suspension provisions of the Agreed Judgment and the Revocation Judgment based thereon, pending the entry of final judgment in this cause;

and Plaintiff further prays for actual damages, attorneys' fees and costs of court and such other and further relief to which Plaintiff may show himself justly entitled to receive.

Respectfully submitted,

S/ Benton Musslewhite

Benton Musslewhite, Pro Se

VERIFICATION

STATE OF TEXAS *
*
COUNTY OF HARRIS *

BEFORE ME THE UNDERSIGNED AUTHORITY, appeared Benton Musslewhite, known to me, and after first being sworn, did upon his oath state, swear and affirm as follows:

> "That I am the Benton Musslewhite, Pro Se and that I have personal knowledge of the relevant facts; that I have read the foregoing Motion and that the matters and facts therein stated, are true and correct."

s/ Benton Musslewhite
Benton Musslewhite

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned Notary Public, this the 16th day of November, 1989.

s/ Janet A. Hays
Notary Public in and for
The State of Texas

My Commission Expires:
10/19/92